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The US has witnessed an enormous federalization of protective devices in the field of criminal law and an expanded interpretation of the first 8 Bill of Rights provisions in recent years. Since the Supreme Court approaches college cases and criminal law cases in the same manner, it is important to know what is happening to the shape of the law. At state institutions, a student is entitled to know with some specificity what the charge against him is, who is testifying, and what they are saying. He is also entitled to a fair hearing, but whether he should have a lawyer has not been held by the courts. The substance of the rules of criminal procedure are subject to constitutional limitation. For instance, the university may forbid disorderly protests on campus but it may not discharge students for their participation in peaceful protests. The problems on campus are caused by student rebellion. It is suggested that they are rebelling because of the war in Vietnam and social injustices such as the plight of the poor blacks, whites, or Puerto Ricans. These are the same problems that burden life and create tension off campus. Since the law is not clear about the procedures required before a student can be expelled for civil disobedience off campus, administrators should try to protect the university community by dealing with on-campus affairs and letting off-campus authorities handle off-campus student activities. (WM)

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IMPLICATIONS OF RECENT COURT DECISIONS INVOLVING RIGHTS AND RESPONSIBILITIES ON THE CAMPUS

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
OFFICE OF EDUCATION

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Many of us have embraced the notion that nobody has to go to college. Look at all of us—we represent so many choices. So, when you come to a certain college, you come under conditions that are imposed on you. This is a notion that surely isn't far from the hearts of everyone here including myself.

The trouble with that is that it doesn't work. Obviously, you cannot condition a university education—it is supported by the state—upon being a Negro, upon being a white person, upon being a yellow person, upon being a Catholic, upon being a Jew, a Republican or a Democrat.

Obviously, there are limits then, to the doctrine of conditions, even in a constitutional sense. We all recognize this. All that has happened is that the doctrine of unconstitutional conditions now has a broader scope than it once had. But the idea is pretty clear—you could not really condition such things in such a way.

A simple approach would be to put in our college catalogs that every student, when he comes to this college, must agree to the following statement: "I hereby abandon all my rights and I will obey everything the administrators say." When the student comes, he signs and that is a condition and a contract.

Obviously, we couldn't do that in respect to race, religion, future behavior, or in the exercise of one's constitutional rights.

Then there is a notion that I think fewer of us than ever before hold, and that is that the university administration acts as a kind of substitute parent. When we are embarrassed in the law we frequently turn to Latin, hoping that most people won't understand it. We say the university administrator acts in loco parentis. The trouble with that is that we have so many students today, and they are so old, and they stay so long. Take a 31-year old graduate student: His mother is long dead and his father is too sick to care. How long can we act in the stead of those parents? We have a great mass of graduate students who work forever on dissertations. They vote, they picket, they send their children to school, and it is embarrassing for the university to act as a substitute parent for them. Even if we were in loco parentis, would any of us have any confidence in the advice parents would give us as to how to treat children in the 1960's? We get the most differing and controversial sets of rules. If the notion that the university and college is a kind of substitute parent would just go away and let those children take care of themselves, we would all breathe much easier and be much happier. If the notion that there is a great discretion delegated to university administrators would also go away, that would be fine, too. There is something to it, and more than meets the eye, perhaps, but still we have to face the fundamental fact that all through our system of government, discretion is limited by legal considerations. Then there is another mistaken idea that somehow the university—and the college, particularly—is a small intimate community, which is easily disrupted and easily pained. It is so intimate and so precious that we ought to be able to remove the rotten apple from the barrel before it spoils the rest. We ought to preserve the harmony and mutual trust that characterizes the university.

The trouble with that concept is that our universities are too big. Can it be said that 16,000 people plus 800, 900, or 1,000 faculty—some of them teaching people how to drive, others teaching the philosophy of Aristotle and Plato—constitute a community in any meaningful sense in the 1960's? The multiple university has gobbled up the intimacy of Plato and six fellows all having a good time and throwing the seventh one out.

Another traditional notion when I was a young fellow was that going to the university was a relatively unusual thing. It was, then. Twenty five years ago, it was exceptional to go into higher education. Today, it is regarded as almost necessary.

In my high school class, I suppose not more than 35 percent of the students went to college. My town was a place with very many middle-class people. College was someplace I wanted to go from as long as I can remember, but not everybody had that desire. And when finally, by a combination of scholarship and the generosity of a loving father and mother, I was able to go to the University of Chicago I saw all those Gothic buildings and I thought, "I must go here or die." And my father helped me do it.

The notion that I would try to run the place! I was so glad to be there!

How many now share that thought? Today many of our middle-class young people come with an expectation that life is more serviceable than that. And I do not fault them for it. That would mistake my meaning. I am merely drawing a difference. You don't expect gratitude from anybody in this life, least of all from those who are under thirty.

Don't we all realize that every group in our society that is aspiring to participate more fully in American life regards education as the road to advancement? They feel they must learn, acquire the skills that our industrial society imposes upon us as a necessary qualification for success. They regard these things as desperate necessities and not as something extra, like a little whipped cream on the pie.

What I have tried to do here is to trace some differences in ideas that might have occurred in the last 25 or 30 years. But another thing has happened which is relevant to our situation vis à vis the law, and this is a little harder to understand. If what I have described is a revolutionary or a major change in ideology, then I would insist there has occurred—less well understood by the general public—a revolution of the law. There are more legal handles to grab onto than there were 25 years ago. A few of them, particularly, have made an enormous difference. Judges, through their power of judicial review, have reached further and further into our common life generally and we as educators participate in that life. The court doesn't decide college cases in one way and the criminal law case in another. Rather, the Supreme Court of the United States approaches these matters as a kind of whole. So we must inquire, when we ask what happens to us as university administrators, what is happening to the general shape of the law.

There are many, many things that have occurred, but I will list about five. The first is that we have witnessed an enormous federalization of protective devices in the field of criminal law, plus an increasing sophistication about what is a sanction and what is not a sanction. Almost all of the first eight amendments, insofar as they have relevance in

the criminal law were until 1949–certainly 1961–not binding on the states at all. These included the right to jury trial, the right to counsel, the privilege against self-incrimination, the right to due process of law, the right to speedy trial, to a public trial–all these things which are really prescriptions for the criminal law case–are found in the first eight amendments. States could have their own rules of criminal procedure so far as we knew when I went to law school, graduating in 1942–but not now.

The second point is that not only have we had a massive federalization of criminal procedure, but the meaning of these first Bill of Rights provisions has enormously expanded. You have read, I am sure, about the case of Miranda against Arizona. It is the case that says police cannot question a person in custody unless they tell him: "You have no duty to speak. You have a right to counsel. If you are too poor to have counsel, we will get you a lawyer. You need not answer any questions until your lawyer is present and if your lawyer says you should not answer questions, we will not ask questions until he is there." The Miranda case was an enormous expansion of what was hitherto understood as an aspect of the privilege against self-incrimination. That is my point. We are not only getting federalization of criminal procedure, but an expanded notion of what these protections are.

But what has criminal procedure to do with us as college administrators? This is linked by my second point, an increasing sophistication of what is a sanction, of what is something detrimental by official decision. An expulsion from school is one of them. And so you get the notion that you cannot, without touching base with certain fundamentals of procedure, expel someone from a state college or university. Not only that, but it seems unlikely to me that private institutions will long remain immune from this constitutional protection. It is true that the Fourteenth Amendment says that no state shall deprive a person of life, liberty or property without due process or equal protection of the law. There are a series of cases that interpret what is state action. Would it be so surprising to find that the court would one day say that if an institution does, in fact, train people to be certified as teachers, does, in fact, take millions of dollars in state and federal money, does, in fact, seek to cooperate with many state and federal programs, then this institution becomes so enmeshed in the total state effort that it is, in fact, an arm of the state for purposes of constitutional protection?

It hasn't happened yet, but all it takes is five judges some day, and they have come perilously close to it. With this kind of background, let's take a quick look at a few law cases that have been disturbing and, in a sense, given us a great deal of difficulty.

First of all, what procedure does the law require before a student can be expelled, suspended, or in any way disadvantaged? We don't know. What we have is a series of intermediate appellate court cases in the Federal system and district court cases in the Federal system. There is no authoritative Supreme Court pronouncement on the problem. That is point number one.

But when you look at the intermediate appellate court cases and the lower court cases, they have in them a kind of logic that does commend itself to me. For example, one is a famous case called Dixon against

Alabama and another is Owen against the Coast Guard Academy, where a Coast Guard cadet was suspended without a hearing. They are both intermediate court of appeals cases in the Federal system and they hold that you cannot do what was done to Dixon and Owen. Education is an enormously important benefit. You and I tell the world how important it is and insofar as we tell people that, they believe it. It is almost like capital punishment when we take the opportunity of it away from them.

Dixon says a student is entitled to a hearing. What does that mean? It means that he is at least entitled to know with some specificity what the charge was and why he was dismissed, so he can meet the charge.

Charges which are unspecific cannot be answered. I wouldn't like it and you wouldn't like it if we were told our conduct was unbecoming a gentleman and we were then asked to defend against that. We would like to know at least in what respect is our conduct unbecoming a gentleman.

The student, I believe, is entitled to know the burden of the case against him, who is testifying and what they are saying, so that the evidence can be met. None of us likes that because it creates a stir inside the academic community. It creates tension. The favorite professor must come forward and tell what he knows. The friend must tell. The boy to be dismissed will know what the friend says. All of these things are disruptive of unity and confidence. Yet I don't know any way in which you can meet a case, if you are unaware of its nature. Can you combat that which you do not know? I know of no way to avoid conflict when conflict is the fact.

I think, therefore, that a fair hearing requires notice – specificity in notice. It also requires an opportunity to meet the case on the other side.

A great question, of course, is whether the student is entitled to a lawyer. The courts have not so held. They have said that a student is entitled to a fair hearing, but not necessarily the kind of hearing that characterizes the criminal process or, indeed, the procedure of a regular administrative agency. One of the troubles with getting lawyers into the act, of course, is that it means the university must have lawyers. Then we have the terrible problem of where to find lawyers. If you have a situation such as Columbia University – 750 persons arrested, 600 or so of whom were Columbia students – where will the university get the lawyers to press the case if the students have lawyers? There is a problem of manpower, a problem of money. And indeed, where do you find the tribunals to try the case, particularly, as is typical these days, if you set up a tripartite tribunal consisting of one or two faculty members, two students and one administrator? You could have all your assistants out trying cases. It is a serious business.

The adversary system is expensive, slow, and uses manpower. The trouble with it is that it can't be dismissed; nobody in American life has any confidence in any other method. You can be as fair as you like and as informal as you like, but the people generally will think you let the student have it. They will say you didn't do it openly and you didn't do it right. Unfortunately, in my view, doing it right means doing it in accordance with some form of the adversary system.

And still all sorts of problems are immediately upon us. Is the tribunal prejudiced if it contains administrators? Is it prejudiced if there is someone from the university there?

Another issue which is put before us ultimately is the issue of equal protection of the law. I suppose out of 550 or so arrested at Columbia, the university probably could really have identified about 60 or 70. That is what I was told by someone who ought to know. The police went into the buildings that were occupied, pulled people out and turned them over to another officer who turned them over to another officer. Finally, they were taken to the station and booked. Nobody knew who made the arrests. The problem of finding out who was in the building was most difficult to establish. If you are going to do that kind of thing, have a lot of infrared cameras and take a lot of notes. You must identify who was taken out of what building by what officer or you can't make out a case that a fair tribunal requires.

Should the hearing be open? Should the press be permitted? What can be the searches and seizures? Can you search a dormitory room? If you think it is packed full of marijuana, or LSD, can you search it? As a state college and a state institution, you engage in state action. As state colleges and universities, you will eventually be called to book to conform to the fundamental outlines of what the courts hold due process to be.

I'm not saying that all the rules of criminal procedure are to be used, but I am saying, with absolute certainty, that ultimately there will be an outside look by a Federal judge at what you do, tested by constitutional standards.

There is a wonderful plea from a judge in Louisiana. He puts it to us as administrators. He says, in effect, don't make the Federal judges come in and use heavy-handed tactics. It is a plea for us to look at our procedures for discipline and at our disciplinary rules, and to put them to rights before a case begins. I will quote from his opinion:

"The Federal judges do not cherish the fact of intervening in matters which properly should be disposed of by local or state officials charged with administration in various fields, but, if the duty is thrust upon us due to inaction, we cannot and will not abandon the task, regardless of our desire to abstain."

This is from a Southern Federal judge, if you will, who, you can be sure, is not a member of the SDS. He says: "From the standpoint of the administration of justice, we strongly urge that this state in its own wisdom encourage its educational institutions to review their existing procedures, to insure that they have adequate procedural machinery to implement the minimum standards already in force."

It is a plea that we clean our own house and not make up the rules as we go along in the face of crisis after crisis.

Now, there is a second point, I think, which is important, and it is that in addition to procedural safeguards, and dismissal or suspension proceedings, there is a second constitutional point that should engage our attention: The substance of the rules themselves are subject to constitutional limitation. For example, one cannot discharge students simply for peaceful protests, however embarrassing these protests might be for us. There are limits to that but if students do act in this way, what would be constitutional for a university or college in the state system to do? A rule which says "No demonstrations may take place without prior approval of the president's office," clearly violates the constitution

of the United States. It is a classic example of prior censorship. It is as if you had to submit manuscripts before publication.

Yes, you can forbid disorderly protests. Perhaps you can forbid protests which interfere with the university's normal activities. But simply to say that all protests have to be registered with the administration beforehand is a loser and doesn't pass muster with constitutional standards.

There is one other point along this line. You might ask, then, what kind of rules can we have? There is a case in California, which, I think, tells us what kind of rules we can have. It is not an authoritative case, not from the Supreme Court of the United States. The language was formulated in the California system at an intermediate appellate level, but I think it has sense to it. I quote from it:

"Thus, the university has the power to formulate and enforce rules of conduct that are appropriate and necessary to the maintenance of order and propriety, considering the accepted norms of social behavior in the community, where such rules are necessary to further the university's educational goals."

That is certainly a meaningful test to me and I put it to you to judge this. If we were to look at all of our rules and ask if they further educational objectives there would be many we could get rid of, rules which are parietal, or which have nothing to do with whether or not a person receives a satisfactory education.

In my talk, I have put our problems in terms of legal context but ultimately our problem is really quite different: Why is it that our young people are so stern? Why is it that we have this sort of turmoil? Is it cussedness? I don't think so. I think that our young people today are facing enormous difficulties of living. They are facing enormous problems that maybe you and I didn't face. Why live? Why go on? These are tensions which go beyond the American communities, I think. The student world is in rebellion the whole world over, not just in Columbia or California. There is tension everywhere. Young people are not bolstered by the kind of support that many of us had from home and from religion and from custom, support that sustained us through a lifetime. That is lost in the 1960's. That is gone. They are looking for something else.

Of course, they are concerned about admissions policies, who teaches them, the shape of the curriculum, but I think these things are very likely to be secondary problems. The big problem is how to live, how to die, how to make do from day to day, whom to love and whom to respect.

Specifically, it seems to me that they are telling us two big things, and a lot of smaller things—problems which are burdening life in the 1960's. One is the puzzling war in Vietnam, where young men are called up for service and possible death and find themselves puzzled about the objectives of the war. I don't mean this speech to be an attack on what those objectives might be. I am merely telling it like it is. The young people I talk to are puzzled. The puzzlement is deep and sometimes expresses itself in great moral concerns. It has our people all upset, and they can't get on Lyndon Johnson, and they can't get on Nixon, and they can't reach Humphrey, and they can't reach Congress, and what they have at hand is this tottering university and, as someone in the New York

system said, "It is such a weak institution, it couldn't even discipline its emeritus professors."

That seems to me to be one thing.

Then there is another point. The young people with whom I talk are telling us over and over: We are too slow to respond to the world's injustices. We are too slow, too sophisticated, too fat, too aged, too insensitive. We don't feel the injustices that we visit upon the Blacks every day of our lives or on Puerto Ricans or poor white folk or crippled people or people in Africa or Asia or South America. It is not simply a racial thing. It is the whole business—we are deaf to justice and they seem to hear it differently. And they want us to do something about it. They want to push us. They want to use means which we regard as outrageous and difficult—and yet there is a point, isn't there?

All of these cases I told you about today are cases that arise in the context of social protest. That is what these cases are about. What do you do with civil disobedience?

One of the interesting things about civil disobedience is that one of the great objectives of the criminal law is lost here, the objective of reformation. Can you think of reforming Dr. Spock? What would you do? He ought to obey the law, but, nevertheless, is his character so warped, so wicked, so vicious that we should put him into a great regimen of psychoanalysis or punishment to make him better? I think that such objectives are silly in respect to a great many people who are protesting out of social concern. In a phrase of a friend of mine, Harry Calvin of Chicago, "I don't know what to do about civil disobedience or people who break the law to make a point except this: When they do, we should do two things. First, punish the action; and second, listen to it."

In the discussion which followed, Paulsen said. . . .

I see the Congressional decision to direct the withholding of Federal aid to students who are involved in disruptive dissent as just an open target for a great deal of disorder on campuses. I don't know how it will be administered, but it seems to me a very bad idea. We need to know what is involved. Peaceful protest is one thing; unlawful activity, another. How it will be administered is, of course, crucial. I don't think that it will live very long, somehow. Universities and colleges, obviously, need Federal aid. Young people need it, and if it is administered in a narrowminded fashion, I think the consequences will be most unhappy for the country.

* * *

You have to let happen some things you know are going to lead to violence, to a considerable extent. You have to let it happen, and the reason for it is easy enough to understand.

If all we had to deal with was Mark Rudd, to take a Columbia character, and two or three others, we would know exactly what we ought to do—move him out. The trouble is that even SDS membership contains a great spectrum of people, many of whom are girl friends of fellows whom they admire; others are half hearted people who don't believe in SDS,

but who don't believe in the establishment either. If you immediately pitch them all out, you have a series of injustices with which you cannot live. What one must do is what one does all the time in the world of criminal law: wait until action takes place and then act.

* * *

The Adderely case derived from a demonstration on a jailhouse lawn. I think there is a big difference between a jailhouse and a university. That is not a quip: that is a serious remark. In the Adderely case a great crowd gathered at the jailhouse and the center of law enforcement. In the South, particularly, the court house is the center of law enforcement. Inside, a group of people were incarcerated who might have been sprung or liberated while the police were diverted dealing with the crowd outside. It seems to me that a jailhouse is a particularly sensitive area from the point of view of law enforcement, from the point of view of safety in the community. I think that a university campus is quite a different affair.

The analogy that some of the courts have made, as I am sure you know, is that protestors can go on the grounds of the state capitol with a petition or with signs and try to see legislators or the governor or his staff. The university is more like that than it is like a jailhouse.

Now, having said that, five judges can prove me wrong. This is a case which indicates the limits of protest, given the setting. I don't think that setting is duplicated on a university or college campus. I call to your mind the fact that there are cases holding that it is lawful to demonstrate, to parade and to make noise on the steps of a state capitol, and that seems more like a university to me than like a jailhouse.

* * *

In the matter of housing, a university has special rights in the landlord relationship and in the kind of contract it draws up with students for the occupancy of a room. One musn't jump from that, however, to the conclusion that you can require students to sign away all their rights under the Fifth and Fourth Amendments. That won't work. If there is anything I think we have learned here, it is that because you can condition one thing upon something else, it does not follow that you can condition everything upon it.

There is a case I read recently which holds that although a student has a right to be free from unreasonable searches and seizures in a state university, even when he lives in a dormitory, the institution can authorize the search of his room on a suspicion that narcotics are there, for example. The court went on to say it didn't think the university must have as much information as a policeman might need to search a private home. You couldn't have a general search of a whole building. If you have a hunch that X is involved and you have some facts to support it, this judge says you can search without a warrant. I don't know whether this decision will stand up; this is a lower court case. All I can say is that you can't assume that simply because somebody is living in a dormitory, you can breeze through his room like a vacuum cleaner. On the other hand, I suppose that neither do you have to treat him as if he were living in a castle.

You can have reasonable rules about the way his room is maintained. If he fails to follow them, he would violate the contract. You could

probably do that so far as the law is concerned, but you might have a lot of trouble with the students who live with these rules. One of the things to remember is that the militant students I have known at Columbia are tremendously moralistic. Hasn't that occurred to all of you? Did conscience ever come so easy to mankind as it does in the 1960's? These students say "I can't do it. You can't make me. God is on my side." Isn't that so? This is the reincarnation of John Calvin in every respect except sex. Don't you feel morally inferior to all of them? They say, "The burden of mankind is on us."

Why are the Wall Street law firms paying $15,000 for students out of law school? That is the going rate for a graduate from the University of Virginia's Law School; he can go to Wall Street and get $15,000 and even a little more. Why is this? Because of the draft? Partly. Is it because business is so good? Partly. But it is also true that enormous numbers of the most talented who graduate from law school don't want to practice law in the big law firms. They want to go into the Peace Corps. They want to to into VISTA. They want to go to the legal aid offices.

What is wrong with that? Haven't we been telling them to be more concerned about mankind? Haven't we said, "Love your brother?"

They are listening to us. That is their mistake.

I think we must really see them as telling us something. We musn't go overboard. There are lots of things I know that I don't know, and there is much that I wish I didn't know.

* * *

I can't see anything wrong with a mechanism such as a council on teacher education that determines at some point whether a student, on application, may enter the curriculum leading to ultimate certification as a school teacher. I can see certain circumstances, however, where it might be challenged. In some institutions, in the desire to maintain high standards of an academic sort, you might find you were excluding a lot of people. For example, to put it bluntly, you might find of the last hundred Black students who applied only 20 percent got through, and of the white students 80 percent got through. At some point, somebody will call that to your attention in a lively fashion. Then, you will find, what will fill you with agony is the question of how good are the criteria you are using. Are they too middle-class? Are they too bourgeois? Are they too safe? Are they too old hat?

We are being pressed on this all along. And is it too much to say that a lot of things we accept as indices of excellence are, in fact, those things which we have, in general, felt pretty comfortable with? This is a circumstance where I can see people saying "Rethink the standards." I can't see anything wrong with the mechanism, but I think there should be a great deal of flexibility in the criteria used to admit people to a curriculum. Whether that would ever get to the level of a lawsuit is another matter, but you would certainly get a lot of stress, taking the example I gave, if there are minority pressures on you at all.

* * *

If a student is up for a suspension hearing and at the same time is facing criminal charges, then you have a very difficult set of legal problems. If the disciplinary hearing comes first, the student will say, "My

privilege against self-incrimination is being impaired. In order to meet these charges against me, which are so significant, I must tell. Then, having told, what I have said can be used against me as an admission under ordinary rules of evidence in the criminal case."

When somebody says to you that that is an unlawful situation, I want you to know that so far as we know it isn't unlawful. We have many cases of that sort. Take, for example, a man who loses hs liquor license and is up for criminal charges of selling to a minor. He loses his license. There is a criminal charge. Both things are true. The authorities may go ahead with the license revocation, and the criminal case comes up later. On that basis, there is no privilege against self-incrimination that the courts presently recognize.

In respect to double jeopardy, the question is this: If a student is before the state authorities for a crime, should he also be disciplined by the university? Isn't that double jeopardy, two punishments for one act? There is a simple legalistic answer. No, it is not double jeopardy. A lawyer will fill your ear with it but at this moment there is nothing in the claim. There are two distinct entities which are injured by the conduct; the university has its own interest and the state has its own interest. Both of these are violated and both have the power to vindicate that interest. The trouble is that the student will bother you with the double jeopardy point.

The expedient thing to do with respect to double jeopardy is to separate it into bits and pieces. If a student is caught robbing a bank, I would let the civil authorities take care of him and not do anything in relation to the university. I don't think his conduct, except in some old-fashioned, small college sense, really injures the university to any extent, although you will have trouble with your trustees on that one.

Suppose it's something less than bank robbery and the student is arrested as a drunk driver. There you can see the university should say it is the student's private life which is in question and the university deals with his intellectual life.

On the other hand, there are some things that happen inside a university, such as seizing buildings, where perhaps the university ought to take care of the matter completely and not seek the civil law for vindication. If, as administrators, we would always ask the question, is there a good, educationally-related objective, I think we would be much ahead. We would get the university out of the business of disciplining people, out of the business of improving personal morality, and into the business of protecting the university community as such.

Anything that happens off-campus, that you can live with on-campus, should remain off-campus. You are never a winner when you deal with a student for off-campus activities. You may be pressured to get into the situation but it is never anything but an enormously sticky and difficult task. In a sense, there is wisdom in saying we run a university and we try to deal with education; therefore things that happen off-campus should be handled by off-campus authorities – if you can get away with it.